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IN THE

# Supreme Court of the United States

No. 174

October Term, 1946.

ROBERT SEALFON,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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ROBERT SEALFON, *Petitioner,*

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UNITED STATES OF AMERICA, *Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Your Petitioner, ROBERT SEALFON, respectfully prays that a *writ of certiorari* issue to review the decision of the United States Circuit Court of Appeals for the Third Circuit, dated May 8, 1947, affirming a judgment of the District Court of New Jersey, convicting your Petitioner of the crime of uttering and causing to be uttered forged invoices for the purpose of defrauding the United States, and sentencing him to serve five years in prison on each of twelve counts of the indictment, to run concurrently, and in addition thereto to pay a fine of $1,000 on each of the said counts.

On May 19, 1947, the Circuit Court continued your Petitioner on bail pending the filing of the petition for a *writ of certiorari.*

On June 5, 1947, time for filing petition having been extended by your Honorable Court for an additional period of 30 days, the Circuit Court of Appeals further continued your Petitioner on bail pending the determination of the petition for a *writ of certiorari.* (R. 548).

## A.

## Statement of the Case.

### 1.

Fresh Grown Preserve Corporation manufactured jams and syrups in Lyndhurst, New Jersey. Murray Greenberg was its president; Leo Greenberg, a brother of Murray, was its vice-president (R. 137). Under the Government's sugar ration regulations the corporation was alloted for the year 1943 and up to April 11, 1944, a basic quota of 2,308,953 pounds of sugar (R. 95-96). It was not lawfully entitled to additional sugar unless it obtained replacement certificates for sugar used in making a product actually delivered to an exempt agency within the United States, such as the Army or Navy, or for export to a foreign country (R. 84-87).

Replacement certificates could be issued by the local ration board upon written application, in which the applicant had to state the name of the particular agency and the time when the sugar-containing product was delivered (R. 87). In addition, proof was required to substantiate the application by evidence showing that the product "had in fact (been) delivered" either for export or to an exempt agency (R. 88).

To circumvent the regulations and to defraud the United States in its governmental function of rationing sugar, Fresh Grown Preserve Corporation, acting through its officers Murray and Leo Greenberg, filed with its local ration board in Rutherford, New Jersey, false applications for replacement certificates and in support thereof submitted forged invoices purporting to show deliveries of sugar-containing products to exempt agencies. Out of 868 forged invoices 596 indicated deliveries to the Brooklyn Navy Yard of vanilla syrup sold to Sero Syrup Company, Brooklyn, New York, the latter being the trade name of Petitioner's business (R. 239, 248, 270). The remaining invoices indicated deliveries to other exempt agencies on behalf of other customers (R. 206, 212, 256, 261).

During the year 1943 and up to April, 1944, the ration board on the basis of the false applications filed by the Greenbergs issued replacement certificates which enabled the Greenbergs to obtain illegally over 25 million pounds of sugar above their corporation's basic quota (R. 190, 272-273).

All of the replacement certificates were issued to the Fresh Grown Preserve Corporation and were presented by the Greenbergs to sugar refining companies whose records show that the more than 25 million pounds of sugar called for by the certificates were delivered to the Greenbergs (R. 263, 266, 272).

Out of the sugar thus illegally obtained the Greenbergs used over 9 million pounds in the manufacture of imitation vanilla syrup—a non-rationed product (R. 94)—which they, pursuant to a written contract (R. 143, 520), sold to Petitioner's company (R. 68-69, 191, 282-284). The remaining 15 million pounds of sugar were used by the Greenbergs in making other products sold to other companies with which Petitioner had no connection whatever (R. 191-192).

Ninety-eight per cent of the syrup purchased by Petitioner was sold by him to the National Biscuit Company of New York, and was delivered to that company directly from the factory operated by the Greenbergs (R. 285-287, 298). At no time did Petitioner attempt to conceal that fact. The Government's proof showed that Petitioner's books, vouchers and checks, as well as those of the trucking company which delivered the syrup for him, contained a full and accurate record of every bit of syrup purchased from the Greenbergs and delivered to the National Biscuit Company (R. 277-284, 296-299, 303, 313-315).

2.

Based upon the foregoing transactions the Government filed two indictments against Petitioner. The first indictment charged that between January 1, 1943 and April 15, 1944, "and continuously from day to day during such pe-

riod" (Exh. D-3, par. 3), Petitioner, together with Fresh Grown Preserve Corporation, Murray Greenberg, Leo Greenberg, S. J. Baron Corporation and others conspired to defraud the United States (Title 18 U. S. C. A. Section 88) and to commit offenses against the United States (Title 18 U. S. C. A. Sections 72 and 80).

Specifically, the object of the alleged conspiracy was to defraud the United States in its governmental function of conserving and rationing sugar by uttering and causing to be uttered to the Ration Board of Rutherford, New Jersey, "false, forged and counterfeited writings purporting to be true and correct copies of invoices" for sugar-containing products falsely claimed to have been sold and delivered by Fresh Grown Preserve Corporation to exempt agencies, and thereby to induce the Ration Board to issue to Fresh Grown Preserve Corporation sugar purchase certificates over and above its fixed or basic quota (Exh. D-3, pars. 3, 3a, 3b, and 3c).

The second indictment, in twelve separate counts, each identical with the other except as to time and contents of the invoices, charged that on October 19, 1943, and on various dates thereafter up to April 6, 1944—a period of time expressly included within the continuous conspiracy alleged in the first indictment—Petitioner together with Fresh Grown Preserve Corporation, Murray Greenberg and Leo Greenberg committed the substantive crime alleged in the first indictment as the primary object of the conspiracy, to wit, uttering and causing to be uttered to the Rutherford Ration Board false and forged invoices for the purpose of defrauding the United States (R. 8-33).

A trial was first had under the conspiracy indictment before District Judge Thomas F. Meaney and a jury. At that trial Fresh Grown Preserve Corporation, Murray Greenberg, Leo Greenberg and S. J. Baron Corporation pleaded guilty (Exh. D-2, 13, 563). Other defendants whose names are not mentioned here were acquitted by direction of the court (Exh. D-2, 436-438, 563). This left Petitioner

as the only defendant on trial, and since there was admittedly no transaction between him and the S. J. Baron Corporation (Exh. D-2, 503-504), the sole question submitted for the jury's determination was whether he entered into a partnership in crime with the Greenbergs and Fresh Grown Preserve Corporation. The court charged the jury that

> "If upon a consideration of all the evidence you entertain a reasonable doubt as to whether this defendant conspired or confederated or agreed with the defendants Greenberg or Fresh Grown Preserve Corporation, New Jersey, or either of them, to commit the crime charged, then the defendant must be acquitted" (Exh. D-2, 578).

In answer to that question the jury said "Not guilty", and a judgment of acquittal was thereupon duly entered (Exh. D-1).

Twenty days later Petitioner was placed on trial before the same judge and a different jury under the second indictment, resulting in the judgment at bar. The Greenbergs and Fresh Grown Preserve Corporation again pleaded guilty (R. 5). And again, the question was whether Petitioner was their associate in the commission of the crime.

No claim was made that Petitioner at any time prepared, filed or handled a single false application or forged invoice, or that he was even present when any such act was done. The members of the ration board never saw Petitioner and did not know who he was (R. 231, 234, 244, 258). They testified that Leo Greenberg was the only one who appeared at the ration board and there filled out and signed the false documents (R. 230, 238, 246, 248, 254, 257). The prosecuting attorney was therefore forced to admit that

> "There is no doubt from the evidence * * * that Leo Greenberg took the applications and the invoi

to the ration board and filled out and signed every one of them" (R. 518-519).

To prove Petitioner guilty of the crime of uttering the false invoices the prosecutor relied upon the Aiding and Abetting Statute, 18 U. S. C. Section 550, which provides that one who "aids, abets, counsels, induces, or procures" another to commit a crime "is a principal" (R. 59-60, 522). It was upon the issue of whether Petitioner was an aider and abettor that the case was submitted to the jury (R. 542-543), the court stating that,

> "The defendant must be acquitted if the jury should entertain a reasonable doubt that this defendant did knowingly, wilfully and feloniously aid, abet or counsel either Greenberg or Fresh Grown Preserve Corp. in the preparation or presentation of the false and fictitious documents" (R. 555).

In support of the aiding and abetting charge the prosecutor resubmitted the same evidence which was received at the prior trial in his attempt to show that Petitioner conspired with the Greenbergs to utter the false invoices. As stated in the opinion of the Circuit Court, "the evidence was substantially the same in the two trials." (See printed Record certified to this Court. R. 592).

Before the trial began and even before the jury was selected (R. 55), Petitioner moved to dismiss the indictment on the ground of the prior judgment of acquittal in the conspiracy case relying on the indictment and record of the former trial and the judgment of acquittal (R. 37-38, 54, Exhibits D-1, D-2 and D-3).

Petitioner's motion was denied. Thereafter he pleaded not guilty to the indictment on the substantive charge and despite Petitioner's contention throughout the trial that the issues regarding the conspiracy and agreement between Petitioner and other alleged co-conspirators had been determined in the former trial, the court refused to admit or

consider record proof of his acquittal on the conspiracy charge (R. 64-65, 81-82, 216, 341, 344-345, 358-359).

In support of its position the court relied upon the well-settled rule that a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy (R. 48, 73, 80), and from that rule the court concluded that

> "a man may be guilty of aiding and abetting the commission of a crime and still not be a conspirator, or he may be a conspirator and still not be an aider and abettor" (R. 73-74).

Conceding arguendo that this is not an erroneous statement in general, upon the facts of this case it is inapplicable. This was not a case in which the Government relied upon proof of circumstances from which the jury might have inferred the existence of an agreement or conspiracy to commit the offense. In this case, only one of the alleged co-conspirators and parties to the illicit agreement pleaded not guilty. Those who pleaded guilty testified as to the existence of the illicit agreement in fact. (See Opinion of the Circuit Court printed in Record certified to this Court.) The evidence at the second trial permitted no inference, if believed, other than that the "aiding, abetting and counseling" with which Petitioner was charged consisted solely of the alleged conspiracy and agreement between Petitioner and the same persons named as co-conspirators in the first indictment.

The only difference between the two trials was the prosecutor's theory. The evidence, the issues, the contentions remained the same. The prosecutor not only relied upon the identical false applications and invoices received at the former trial on the theory of conspiracy (Exh. D-2, 124, 127, 568); he also called the same witnesses who repeated their testimony almost *ipsissima verba*. The Circuit Court agreed that "The identical invoices, the letter, the same testimony and exhibits were admitted in the evidence", and it held that "The very record of the first trial could

have been introduced at the second trial under stipulation, and the case submitted upon it alone" (See Opinion printed in Record certified to this Court R. 592).

Indeed, the identity of the two trials was so complete that the prosecutor did not even have to change his summation. A few illustrations will suffice. Before quoting them it is important to bear in mind that the illustrations deal with a letter admittedly written by Petitioner to the Fresh Grown Preserve Corporation, *the writing of which was alleged in the first indictment as an overt act committed by Petitioner in furtherance of the conspiracy* (Exh. D-2, 19-20).

(These illustrations are set out in Appendix A hereof.)

The letter, which at the first trial was alleged as an overt act committed by Petitioner in furtherance of the conspiracy (Exh. D-2, 19-20) and at the present trial was alleged as "the principal feature of his aiding and abetting of Greenberg" (R. 537), was in fact always "retained in the files of the Fresh Grown Preserve Company" (R. 143). It was never presented to the ration board. The members of the board testified that they never saw the letter, never heard of it, and that if it had been presented to them it would have been attached to the applications filed by Greenberg and kept in the files of the ration board (R. 232, 237, 244-245, 254-255).

Such being the Government's proof, the letter played no part whatever in deceiving the ration board to issue sugar replacement certificates to the Greenbergs, who obtained the certificates solely by preparing and submitting false applications and forged invoices. The trial court, therefore, charged the jury that the "discussion which was had between Greenberg and Sealfon is *the crux* of this situation" (R. 550).

That discussion, however, dealt with the alleged corrupt "deal" (R. 141, 146) or "arrangement" (R. 142, 150, 151, 152, 153, 154, 186, 209) whereby Petitioner who sold syrup to "a civilian company at the Brooklyn Navy Yard"

was to write a letter to Greenberg's corporation "saying that he was selling to or at the Brooklyn Navy Yard without mentioning the civilian company" and thus "leave the inference" that he was selling directly to the Navy Yard. In return for the letter Greenberg agreed to sell more syrup to Petitioner and to give him "a cheaper price in the form of a rebate" (R. 140-141). Greenberg testified, "Write me that letter and you have got a deal" (R. 141); and the prosecutor described his testimony as "the talk and planning between Murray Greenberg and Sealfon" and as "that plan, to file a false letter" (R. 529, 530).

Obviously, whether or not Petitioner entered into a corrupt "deal", "arrangement" or "plan" with Greenberg to deceive the ration board by uttering forced invoices was the only issue at the conspiracy trial, and the jury's verdict of not guilty necessarily determined that issue in favor of Petitioner. Thus that which the trial court designated as "the crux of this situation" was formerly litigated and determined against the prosecution, for an acquittal of conspiracy, the gist of which is the corrupt agreement, is an acquittal of the "deal" or "plan" to commit the crime.

In short, the second trial was nothing more than a retrial of the conspiracy case before another jury under the different title of "aiding, abetting and counselling" the same co-conspirators.

Yet the trial court rejected Petitioner's argument that the doctrine of *res judicata* or estoppel by judgment prevented the relitigation of the matters theretofore settled between the parties and over his objection admitted into the evidence proof of the conspiracy and agreement between Petitioner and the other aleged co-conspirators. Moreover, the Court, after having rejected the doctrine of *res judicata* rightly or wrongly, thereafter prevented Petitioner from producing evidence on his own behalf in the form of the record proof of his acquittal of the conspiracy charge. The Circuit Court of Appeals sustained the trial court's actions throughout.

## B.

## The Questions Presented.

The following three questions arise as a result of the action of the trial court as affirmed by the Circuit Court of Appeals:

(1) A defendant is tried for the crime of having conspired with another to utter false invoices for the purpose of defrauding the United States and is found not guilty by verdict of a jury. Thereafter, the same defendant is charged as a principal with the commission of the substantive offense of uttering the same false invoices on the theory that he aided and abetted the same individual named as the co-conspirator in the conspiracy indictment of which he was acquitted. Question: Where the fact of such conspiracy is essential to proof of his guilt of said substantive offense may this question be relitigated by the Government or is evidence of such conspiracy inadmissible in the trial on the charge of the substantive offense as being in violation of the due process clause of the U. S. Constitution, Fifth Amendment in that (a) it is contrary to the common law principle of *res judicata*, and (b) it permits the re-examination of a fact tried by a jury and found in favor of a defendant in a criminal case?

(2) Where the Government (rightly or wrongly) is permitted to relitigate the same issue of conspiracy by offering the same proof of the same agreement, is the defendant denied due process of law and the constitutional right of producing evidence in his own behalf by the trial court's refusal to admit or consider record proof of the former acquittal of the conspiracy?

(3) If the issue involving the same alleged agreement between petitioner and the same individual cannot be relitigated with the result that such evidence is inadmissible in the trial of the substantive offense, is that evidence which

was properly admitted sufficient to prevent judgment of acquittal?

## C.

### Reasons Relied On for Allowance of the Writ.

In the decision sought to be reviewed, the Circuit Court of Appeals has decided important questions of federal criminal law in a way probably in conflict with applicable decisions of its own as well as those of this Honorable Court and has sanctioned such a departure by a lower court from the accepted and usual course of judicial proceedings as to call for the exercise of your Honorable Court's power of supervision under the rule of *McNabb v. United States*, 318 U. S. 332, 63 S. Ct. 608. The decision sought to be reviewed invades constitutional rights and establishes a dangerous precedent by its holding that the former judgment of acquittal settled nothing. It runs counter to the decisions of this Honorable Court that the principle of *res judicata* does apply in criminal cases.

Indeed, it is far more important that this fundamental principle of justice apply to cases where life and liberty are at stake than where the controversy involves merely a debt. If the decision of the court below is permitted to stand, it will place in the hands of prosecuting attorneys the power of subjecting one charged with conspiracy to successive prosecutions based upon the same evidence without being bound by the results achieved in the first trial. Thus, by filing two indictments with different titles—one charging conspiracy, the other charging commission of the substantive offense by aiding and abetting—a prosecutor could harass the defendant by successive trials and put him in peril repeatedly even after a jury has rendered a verdict of not guilty on the only issue involved. It would mean that the first trial on the conspiracy charge could be viewed merely as a preliminary or practice skirmish which would enable the prosecutor to determine the nature of the defense and, in the light of the experience obtained, increase

the likelihood of a conviction in the second trial. That is precisely what was done in the case at bar and if tolerated would open the door to successive prosecutions based upon the same asserted conspiracy of one who was found not guilty of the very same conspiracy after full and fair trial.

Petitioner does not contend that prosecutors may not elect to try a substantive offense separately from a conspiracy to commit that substantive offense. He does assert that whichever issue is settled first must remain settled forever—if it be the whole issue at the second trial, that whole issue is concluded; if it embraces only part, that part is concluded.

Moreover, if this decision is permitted to stand uncorrected, it will result in a denial to the accused of the fundamental right to produce evidence in his own behalf since the trial court refused to admit or consider record proof of the former acquittal of the conspiracy.

Finally, if your Petitioner is correct in his contention that the issue of the agreement and conspiracy could not properly be relitigated so that the evidence thereof was inadmissible, the evidence which was otherwise properly admitted was insufficient to sustain the conviction.

Your petitioner, therefore, believes that this application presents a case cognizable by your Honorable Court under the Constitution and Statutes of the United States and the rules of this Honorable Court, and one eminently proper for review.

WHEREFORE, your Petitioner respectfully prays that a *writ of certiorari* be issued out of and under the seal of this Court directed to the Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and send to this Court for its review a full and complete transcript of the record of all proceedings in said suit, proceeding or matter, and to stand to and abide by such order and direction as this Court shall deem meet under the circumstances of the case, and that your Petitioner may have such other

and further relief or remedy in the premises as to this Court may seem just and proper.

Dated: July 3, 1947.

ROBERT SEALFON,
*Petitioner.*

By ROBERT T. MCCRACKEN,
LEMUEL B. SCHOFIELD,
THOMAS D. MCBRIDE,
*Counsel for Petitioner.*

## BRIEF IN SUPPORT OF PETITION.

## ARGUMENT.

### I.

**The Decision Sought to be Reviewed Is in Violation of the Due Process Clause (U. S. Constitution, 5th Amendment) in That (a) It Is Contrary to the Common Law Principle of Res Judicata and (b) It Permits the Re-examination of a Fact Tried by a Jury and Found in Favor of a Defendant in a Criminal Case.**

Petitioner was subjected to two trials. In the first the Government sought to prove that he had entered a co-partnership in crime with the Greenbergs and others charged as co-conspirators. The Greenbergs and their corporation, Fresh Grown Preserve Corp., alleged co-conspirators, pleaded guilty. The Government's proof was not limited to evidence of the commission of certain acts and surrounding circumstances from which the criminal agreement could be inferred. Rather, the Government, in the first trial, produced direct evidence of an alleged agreement between Petitioner and the other alleged co-conspirators. Petitioner was found not guilty. In the second trial, the Government sought to prove that he was guilty of the substantive offense, jointly with the same Greenbergs and their corporation, Fresh Grown Preserve Corp. Again, the others indicted with the Petitioner pleaded guilty. The Government was allowed to produce direct proof in the second trial that Petitioner was an "aider and abettor" and therefore a "principal" because he had entered into an agreement with the Greenbergs. Over Petitioner's repeated objections, the Government was permitted to retry before another jury the question of whether Petitioner had in fact and law entered into a co-partnership in crime with the Greenbergs and their corporation. The Trial Judge's action as affirmed by the Circuit Court of Appeals is herein

challenged by Petitioner as being in violation of his constitutional rights.

In order to understand what this case is, it is important to know what it is not. Petitioner is not now attempting to have this Court incorporate into the language of the 14th Amendment those safeguards and rights which are expressly found in one of the first eight amendments. This is a case which must be determined purely under federal law. The trial occurred in a federal court and there can be no question therefore of Petitioner's right to the protection of the 5th Amendment in that trial.

Petitioner does not contend that his protection against *double jeopardy* as guaranteed by the 5th Amendment has been violated. It is conceded that since conspiracy is an offense which is different from the commission of the substantive offense, he was not put in double jeopardy when he was tried on the second indictment. Petitioner also concedes that the common law principle of *autrefois acquit* does not apply.

However, your Petitioner claims that his rights as guaranteed by the due process clause of the 5th Amendment have been violated as a result of the action of the trial court, sanctioned by the Circuit Court of Appeals. He maintains that the due process clause of the 5th Amendment requires (a) the application of the common law principle of *res judicata;* and (b) prohibits in favor of a defendant in a criminal trial the re-examination of any fact tried by a jury otherwise than according to the rules of the common law.

*A.*

*Res Judicata.*

This Court, many years ago, held that the fundamental principle of *res judicata* is "as applicable to decisions of criminal courts as to those of civil jurisdiction." *Frank v. Mangum,* 237 U. S. 309, 334, 35 S. Ct. 582.

Such a "fundamental principle of justice" *(U. S. v. Oppenheimer,* 242 U. S. 85, 88, 37 S. Ct. 68) must of neces-

sity be part of due process of law. As stated by Mr. Justice Brandeis *(Collins v. Loisel,* 262 U. S. 426, 430, 43 S. Ct. 618): "The 5th Amendment in providing against double jeopardy was not intended to supplant the fundamental principle of *res judicata* in criminal cases."

It is to be noted that this principle applies whenever there has been a determination on the merits—whether by a jury or otherwise—of a matter in controversy. For example, the doctrine of *res judicata* may be invoked where judgment of acquittal follows upon a plea of the statute of limitations, even though the defendant had not been tried by a jury upon the facts of the offense charged. *U. S. v. Oppenheimer,* 242 U. S. 85, 87, 32 S. Ct. 68. As Mr. Justice Holmes there stated:

"Of course, the quashing of a bad indictment is no bar to a prosecution upon a good one, but a judgment for the defendant upon the ground that the prosecution is barred goes to his liability as matter of substantive law and one judgment that he is free as matter of substantive law is as good as another. A plea of the statute of limitations is a plea to the merits (*United States v. Barber,* 219 U. S. 72, 78, 31 S. Ct. 209, 55 L. Ed. 99, 101), and however the issue was raised in the former case, after judgment upon it, it could not be reopened in a later prosecution. We may adopt in its application to this case the statement of a judge of great experience in the criminal law: 'Where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, that adjudication, whether it takes the from of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offense. • • • In this respect the criminal law is in unison with that which prevails in civil proceedings.' Hawkins, J., in *The Queen v. Miles,* L. R. 24 Q. B. D. 423, 431. The finality of a previous adjudication as to the matters determined by it, is the ground of decision in *Com. v. Evans,* 101 Mass. 25, the criminal and the civil law agreeing, as Mr. Justice Hawkins

says. *Com. v. Ellis,* 160 Mass. 165, 35 N. E. 773; *Brittain v. Kinnaird,* 1 Brod. & B. 432, 129 Eng. Rep. 789, 4 J. B. Moore, 50, Gow, N. P. 164, 21 Revised Rep. 680. Seemingly the same view was taken in *Frank v. Mangum,* 237 U. S. 309, 334, 35 S. Ct. 582, 59 L. Ed. 969, 983, as it was also in *Coffey v. United States,* 116 U. S. 436, 445 (446), 6 S. Ct. 437, 29 L. Ed. 684, 687."

*Res judicata* is thus an essential ingredient of the judicial process. "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Baldwin v. Iowa State Travelling Men's Assn.,* 283 U. S. 522, 525, 51 S. Ct. 517. See also *Southern Pacific R. Co. v. U. S.* 168 U. S. 1, 48, 18 S. Ct. 18.

*B.*

*Due Process (5th Amendment) and the 7th Amendment.*

Moreover, what is proscribed by the 7th Amendment in civil suits where the value in controversy exceeds $20.00 also comes within the scope of the protection afforded by the due process clause of the 5th Amendment. Surely, the protection to which he is entitled when he is a defendant in a suit in which the value in controversy exceeds $20.00, Petitioner may rightfully claim in a criminal suit where that which is in controversy involves his liberty. "It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." *U. S. v. Oppenheimer,* 242 U. S. 85, 87, 32 S. Ct. 68.

The history of the 7th Amendment indicates that its purpose was to assure trial by jury in civil cases. As stated by Mr. Justice Story (*Parsons v. Bedford,* 3 Pet. 433, 443, 28 L. Ed. 433), "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy . . . One of the strongest

jections originally taken against the Constitution of the ited States, was the want of an express provision secur- the right of trial by jury in civil cases. As soon as the nstitution was adopted, this right was secured by the enth amendment of the Constitution proposed by Con- ess, and which received an assent of the people so general to establish its importance as a fundamental guarantee the rights and liberties of the people." And, in referring the proscription against re-examination of a fact tried by ury otherwise than according to the rules of the common v, Justice Story characterized this clause of the 7th nendment as "still more important, and we read it as a bstantial and independent clause." There was no need include within its language an express guarantee to a fendant in a criminal case since the 5th Amendment ac- mplishes this result by the safeguard of due process, ich embodies those ancient rights which came to us rom the law of England." *Dent v. West Virginia*, 129 S. 114.

That nowhere in the Bill of Rights is it expressly stated at a fact tried by a jury and found in favor of a defend- t in a criminal case cannot be re-examined, does not mean at such a fundamental right of the accused does not exist. was unnecessary expressly to set forth this safeguard. oreover, there is no mutuality in the application of this ndamental principle. The protection is universally ac- rded only to the accused. So far as the prosecution is ncerned, it must prove, each time a defendant is tried, ery essential element of the crime charged. It can be seen erefore that to have included criminal cases in the lan- age of the proscription of the 7th Amendment against examination of facts would have been contrary to the mmon understanding and purposes of the framers of the nstitution and in violation of those fundamental rights ssessed by the accused then and now under the English d American law.

The only methods known to the common law to re-ex- ine facts tried by a jury are (1) the granting of a new

trial by the court wherein the issue was tried, or to which the record was properly returnable; and (2) the award of a *venire facias de novo* by an appellate court for some error of law which intervened in the proceedings. *Parsons v. Bedford*, 3 Pet. 433, 28 L. Ed. 433; *Thorn v. Browne*, 257 F. 519 (C. C. A. 5); cert. denied 250 U. S. 645, 39 S. Ct. 494.

To allow a re-examination of a fact once tried by a jury and found in favor of a defendant would therefore violate the due process clause of the 5th Amendment.

## C.

### *Errors of the Courts Below.*

Application of these principles to the questions herein presented requires the conclusion that both the trial court and the Circuit Court of Appeals committed fundamental prejudical and harmful error. Whether Petitioner had entered into a conspiracy or criminal co-partnership with the Greenbergs was the matter that had been contested in the trial on the conspiracy indictment. The final result of that trial settled that issue forever *vis a vis* the United States and Petitioner.

Additionally, whether Petitioner had entered into a conspiracy or criminal co-partnership with the Greenbergs was a fact tried by a jury and could not be otherwise re-examined in any Court of the United States than according to the rules of the common law. Neither of the modes known to the common law for the re-examination of facts tried by a jury were or could be resorted to by the Government in this criminal case.

We concede that Petitioner's acquittal of the conspiracy charge did not *bar* his prosecution on the indictment charging the substantive offense—even though guilt of the substantive crime might consist in his "aiding and abetting" one who actually committed the prohibited act. It is precisely on this point that the Circuit Court of Appeals fell into error. That Court, in its opinion per Albert Lee

Stephens, Circuit Judge, confused the common law principles of *res judicata* and the proscription against re-examination of facts once tried by a jury on the one hand, with the doctrines of double jeopardy and *autrefois acquit* on the other hand. In doing so it misapplied a decision of its own Circuit as well as a recent Supreme Court decision. The Court states (see Opinion printed in Record certified to this Court R. 590, 591).

> "There is conclusive authority for the rule that where a conspiracy to commit a crime is charged as an offense, neither an acquittal nor a conviction of a conspiracy to commit the crime is per se a bar to a prosecution for the commission of the crime, or for aiding and abetting another to commit it. The two are distinct and separate crimes. Carter v. McClaughry (1902), 183 U. S. 365; Louie v. United States (Cir. 9, 1914), 218 Fed. 36; Bens v. United States (Cir. 2, 1920), 266 Fed. 152; and Curtis v. United States (Cir. 10, 1933), 67 Fed. 2d 943. On page 643 of the opinion in the very late case of Pinkerton v. United States (1945), 328 U. S. 640, appears the following: 'Nor can we accept the proposition that the substantive offenses were merged in the conspiracy. There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime. See United States v. Katz, 271 U. S. 354, 355-356; Gebardi v. United States, 287 U. S. 112, 121-122.'
>
> Wisely or not, the doctrine that the conspiracy fuses into and becomes one with the accomplished crime is not made the American rule. By operation of statute the 'aider and abettor' of the commission of a crime is a principal in the crime, and is punishable as though he actually was the perpetrator of the crime. Title 18

"U. S. C. A. § 550 provides 'that whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal.'

In Pinkerton v. United States, supra, the Supreme Court upheld the conviction of a man on a substantive crime upon evidence that he had conspired with the actual perpetrator, and no evidence had been given that he had withdrawn from the conspiracy before the crime was committed. The theory was that since the conspiracy continued through the actual commission of the crime, 'The act done was in execution of the enterprise. The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle:' (Page 647.)"

We submit that the Circuit Court has misconstrued the *Pinkerton* decision. This Court there held that a person may be guilty of both a conspiracy and the commission of a substantive offense simultaneously. The *Pinkerton* decision has no application to the pivotal question at issue here. Petitioner does not now contend that the doctrine of double jeopardy here applies. It is conceded that the indictments charged two *different* offenses. In proving that which was charged in the second indictment, however, the Government succeeded in relitigating the issue of whether a criminal conspiracy and co-partnership had existed between Petitioner and the Greenbergs. It also succeeded in re-examining the asserted fact of such criminal conspiracy and co-partnership after it had already been tried before a jury. The *Pinkerton* case does not sanction such practice. Nor could it, in view of the requirements of the due process clause. If the prosecuting attorney chooses to proceed against a defendant by separate and successive trials, under indictments such as those herein considered, he must run the

risk of an unsuccessful conclusion in the first trial of an issue which may be partly or wholly in issue in the second trial.

Application of the principle of *res judicata* requires only that the parties to the controversy be the same and that a particular controverted matter be settled. It is not necessary that the precise issues be involved as the whole of the second trial nor that the evidence in both trials be identical for *res judicata* to apply. The parties to the controversy being the same, all matters involved in the first contest are concluded by the result reached in that trial.

The doctrine of *res judicata* required that in the instant case the Government be foreclosed by the result in the first trial as to the matter of the conspiracy, irrespective of the identity of evidence. *U. S. v. Adams*, 281 U. S. 202, 50 S. Ct. 269. It so happens that in this case, as the Circuit Court of Appeals stated, substantially the same evidence and proof was offered by the government in both trials. That does not control the present point. What is of consequence is that the first trial settled for all time the question of whether the Petitioner was a co-conspirator and co-partner in crime with the Greenbergs and the other alleged co-conspirators.

Yet the trial court completely rejected Petitioner's contention to this effect. In his charge to the jury on the second trial, the trial judge stated,

> ". . . and in that discussion which was had between Greenberg and Sealfon is the crux of this situation" (R. 550).

The discussion which the judge properly called the "crux of this situation", was the very same discussion which constituted the conspiracy charged. If the discussion occurred, Petitioner might have been both a co-conspirator and an aider and abettor. If it did not occur, he was neither. And the first trial established, once and for all, that it did not occur.

The jury in the conspiracy case by its acquittal necessarily found that Petitioner did not enter into an agreement with the alleged co-conspirators. Therefore, evidence admissible only to prove such criminal agreement was inadmissible in the present case. This was specifically held in a previous decision of the Third Circuit, *United States v. De Angelo*, 139 F. 2d 466 (C. C. A. 3), thought by the court below to be inapplicable to this case. The Court there stated, 138 F. 2d at page 468, "The conclusiveness of a fact which had been competently adjudicated by a criminal trial is not confined to such matter only as is sufficient to support a plea of double jeopardy. Even though there has been no former acquittal of the particular offense on trial, a prior judgment of acquittal on related matters has been said to be conclusive as to all that the judgment determined. Cf. *U. S. v. Adams*, 281 U. S. 202, 205, 50 S. Ct. 269, 74 L. Ed. 807."

The trial court's ruling thus is in direct conflict with the doctrine of *res judicata*, and the proscription against re-examination of a fact once tried by a jury. It is submitted that the affirmance of this ruling by the Circuit Court was in direct conflict with its own prior decision, and sanctions a violation of retitioner's rights under the 5th Amendment.

## II.

## Defendant Was Denied His Constitutional Right of Producing Evidence in His Own Behalf.

Throughout the trial of this case, the trial judge not only refused to admit but also refused even to consider proof of Petitioner's former acquittal of conspiracy (R. 64-65, 81-82, 216, 341, 344-345, 358-359). Thus, when counsel for Petitioner offered "to open to the jury on the theory that the issue of Sealfon's participation in the crimes charged in this indictment was present in and material to the trial on conspiracy heretofore tried, and which resulted in the jury's verdict of acquittal in favor of Mr. Sealfon

and conclusively answered that issue adversely to the Government—", the court denied him this right, stating, "Yes, and the ruling is that I will not permit that because I don't think it is proper either in the opening to the jury or on summation. Counsel may have an exception to both rulings." (R. 359).

This amounted to a denial of the right of a defendant to produce evidence in his own behalf, the barest minimum requirement of due process.

There could be no better proof of the defendant's non-participation in the copartnership to defraud the United States and to utter the false invoices than the record proof of his acquittal in the conspiracy trial. Suppose that defendant had offered in evidence competent and admissible oral testimony that he had not made the agreement. No one would deny that the refusal of the trial judge to hear such testimony would constitute a violation of defendant's right to produce evidence in his own behalf. Yet such oral evidence would in itself not be conclusive. The jury would have to pass upon the question of credibility. Here, however, that which the defendant was prevented from placing in evidence was incontrovertible documentary evidence in the form of record proof that he had not made the agreement. This proof would have been conclusive upon both court and jury. *A fortiori*, the trial court's action was a denial to the Petitioner of his right to produce evidence in his own behalf and was thus in violation of the due process clause. Cf. *Tot v. United States*, 319 U. S. 463, 63 S. Ct. 1241; *Heiner v. Donnan*, 285 U. S. 312, 52 S. Ct. 358; *Manley v. Georgia*, 279 U. S. 1, 49 S. Ct. 215; *Bailey v. Alabama*, 219 U. S. 219, 31 S. Ct. 145.

In *U. S. v. De Angelo*, 138 F. 2d 466 (C. C. A. 3) the defendant, having been acquitted of the substantive offense of robbery was subsequently tried for conspiracy to commit the robbery. At his trial, he offered in evidence record proof of the acquittal to controvert Government evidence as to a fact found in his favor in the former trial. The trial court received the proof in evidence "subject to the

limitation that it be not disclosed or otherwise made known to the jury." Of this action, the Circuit Court of Appeals said (138 F. 2d at p. 469): "We think that the trial court's rejection of the appellant's offers, which became relevant because of the government's allegations and evidence, constituted substantial error. Cf. *Crawford v. U. S.*, 212 U. S. 183, 203, 29 S. Ct. 260, 53 L. Ed. 465, 15 Am. Cas. 392."

## III.

## The Properly Admitted Evidence Was Insufficient to Go to the Jury.

This highlights the importance to Petitioner of a proper decision of the pivotal question discussed above. The entire theory of the prosecution was, as disclosed by Government Counsel's opening speech, that a conspiracy in fact existed between Petitioner and the Greenbergs. As in the prior trial, this was not a case in which the Government was driven to proof of the conspiracy or agreement by inference from overt acts or surrounding circumstances. Here, the alleged co-conspirators pleaded guilty and, in both trials, testified to the *actual agreement*. Government Counsel stated (R. 66-67).

> "We will show you a conversation took place between Sanford Doctors and Murray Greenberg and that as a result of that conversation Sanford Doctors went and talked to Robert Sealfon and told him Murray Greenberg had proposed that if Sealfon would write a letter listing the names of some customers of his, and if there were any exempt agencies to include those, that he, Greenberg, and the Fresh Grown Preserve Company, would be able to sell syrup to Sealfon in larger quantities. We will give you the full conversation that took place between Doctors and Sealfon; and we will then prove that a letter was written. We will also prove that before it was written there was conversation between Murray Greenberg and Robert

Sealfon in which both persons perfectly well understood, as you will see from the testimony of the conversation, that the letter was going to be fictitious; because Sealfon was told by Murray Greenberg that even though he was not dealing with exempt agencies, that if he would indicate in that letter that he was so dealing, that letter would be used by Greenberg in order to get more sugar from the ration board.

And we will also bring evidence to show you that Robert Sealfon knew from that conversation the way in which it was going to be used, and knew that Murray Greenberg and the Fresh Grown Preserve Company were going to prepare false invoices, using the names contained in that letter, to submit to the Rutherford Ration Board, attached to applications for replacement of sugar, and to make it appear to the Rutherford Rationing Board that sales of syrup were being made by Robert Sealfon to the Brooklyn Navy Yard, whereas both of them knew that that was not true."

The whole structure of the Government's case against Petitioner rested on proof of the alleged agreement to violate the laws of the United States followed by the commission by other persons of various acts pursuant thereto. Once the evidence of such agreement is stricken out, as we maintain it must be, the structure collapses.

The overt acts other than the writing of the letter were committed not by the Petitioner but by the other alleged co-conspirators and evidence thereof was inadmissible against the Petitioner except upon proof of the conspiracy. It is of no consequence that the jury might be asked in the second trial to find the conspiracy from the overt acts rather than proof of the actual agreement. The point is that it had been finally and conclusively settled between the Government and Petitioner that Petitioner was not a party to any such agreement irrespective of any evidence whatever.

The Government's case therefore necessarily fails without such inadmissible proof. Therefore judgment of acquittal ought to have been entered pursuant to Petitioner's motion.

## CONCLUSION.

We respectfully submit that this is a case which deserves review by this Honorable Court. Grave constitutional questions are directly put in issue. In addition, it is submitted that since this case presents serious questions affecting the administration of federal criminal law it calls for the exercise of this Honorable Court's supervisory power over federal criminal prosecutions under the rule of *McNabb v. United States*, 318 U. S. 332, 63 S. Ct. 608.

Respectfully submitted,

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## APPENDIX A.

**Excerpts From Prosecutor's Summation in Both Trials.**

| *At the conspiracy trial* | *At the present trial* |
|---|---|
| 1. "the letter, the all-important letter was written. • • • He entered into the conspiracy by this act and by his negotiations concerning it" (Exh. D-2, 546, 559). | 1. "writing the letter which was, of course, the principal feature of his aiding and abetting of Greenberg" (R. 537). |
| 2. "We don't have to prove that this letter was exhibited to the local OPA board • • • That wasn't the plan at all" (Exh. D-2, 549-550). | 2. "And much has been made • • • about the fact that Sealfon didn't get over to the Rutherford Ration Board or make any contact at all there. That wasn't part of the plan" (R. 538). |
| 3. "He knew that he wasn't going to deliver it to any exempt agency or to any name that was on his letter, and he can't fool you now by saying that he was talking about his past sales or his personal sales • • • that this letter says 'our sales', and that it means 'our sales independently of the supply that came in from the Fresh Grown Preserve Company'" (Exh. D-2, 557-558). | 3. "I say to you that you can't be naive enough to think that Sealfon was talking about what he might have done in the past with his own syrups. It is perfectly clear that he wanted to show in here,—no matter what language he used and in spite of the fact that he used the word 'our'—what he was going to do with syrup that he got from Greenberg. • • • He knew • • • he had never delivered to any exempt agency" (R. 531, 532). |

| *At the conspiracy trial* | *At the present trial* |
| --- | --- |
| 4. "let us reflect on the position that Sealfon found himself in prior to March 3, 1943 (the date of the letter). He had an arrangement before February 17th with the National Biscuit Company" (Exh. D-2, 547). | 4. "Let us consider • • • the position in which Sealfon found himself approaching the date of March the 3rd • • • Let us consider that he had this opportunity • • • in February of 1943 to sell • • • syrup to the National Biscuit Company" (R. 519). |
| 5. "Greenberg told Sanford Doctors to go to Sealfon and get from Sealfon a letter • • • and to tell Sealfon that if he wrote it he, Sealfon, could get syrup from Greenberg in larger quantities" (Exh. D-2, 548). | 5. "Mr. Sanford Doctors said that he went and told Sealfon that if the letter would be written, he gave Murray Greenberg's message to Sealfon, that if the letter would be written he, Sealfon, would get syrup in larger quantity" (R. 520-521). |